Meditating Comparisons, or the Question of Comparative Law

Igor Stramignoni

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Meditating Comparisons, or the Question of Comparative Law

IGOR STRAMIGNONI*

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I. ABSTRACT

Many today claim that, after WWII, the fall of the Berlin wall and, now, September 11, 2001, the changing nature of nation states, democracy, and the law can no longer be sensibly ignored. How can comparative law contribute to such an important debate? In what follows, it is argued that one way to contribute to the debate over the changing nature of nation states, democracy, and the law would be to engage in poetic comparisons of law’s many domains. What, then, are poetic comparisons of law, and what do they invite us to do? Learning from Martin Heidegger’s life-long advocacy of meditating thinking, poetic comparisons of law are meditating comparisons. Neither poetry nor any such form of representational thought, poetic comparisons of law encourage us to begin by thinking legal thinking afresh and, in particular, by thinking again the long-forgotten question of comparative law—what is comparative law? A radical answer to such a question clearly shows how it is only by bringing language as well as difference firmly at the center stage of comparative analysis that we might be able ever again to conduct meaningful comparisons in today’s rapidly changing societies. Poetic comparisons of law, however, take language and difference to mean something quite unlike their ordinary, everyday meaning.

II. INTRODUCTION

After millennia, not so much of humanism as of (Graeco-Latin and Judeo-Christian) anthropocentrism, a great schism is in preparation, and we are living through the beginnings of it.

[1] Is it normal to build and construct? In fact, it is not, and we should preserve the absolutely problematical character of the undertaking.

A. Nation States, Democracy, and the Law

Can thought be thought afresh? Can law—this most fortunate, elaborate, controversial artifact of human thinking—be thought afresh? Surely, these are rather large and daunting questions to ask—yet questions which the increasing displacement of the modern nation state and its laws demands urgently to ask. As now Ground Zero seems to have dramatically replaced the Brandenburg Gate as the symbolic place of a very real if wider process

3. In what follows, I shall use indifferently the expressions “state” and “nation state” to indicate what, in the relevant literature, is normally referred to as the modern nation state or, as the U.S. State Department puts it, the “European state model”.

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of reconfiguration of the “West”, many understandably claim that, as a consequence, nation states have now grown weaker than ever before, and so the big question can no longer be sensibly postponed whether there can be democracy without, or upon the decline of, the nation state. For if states are, quite literally, loosing grounds, democracy need not necessarily follow suit. Yet, at the same time, the uncertain evolution of Western democracies cannot but reflect on Western conceptions of law—and that is, by contrast, an issue which commentators are often much more reluctant to consider or to tackle. That is to say, one might have to ask whether there can be law (in any modern-democratic sense of that word) in what appear to be progressively stateless democracies—“stateless” in the specific sense of being democracies where state institutions play a considerably humbler role than ever before. If the answer is yes, how so? If the answer is no, then why not? Take the matter of legislation and adjudication. Traditionally, legislation and adjudication are jealously guarded national, regional and even local an affair, and there is scope to think that, despite the appearances, this might continue to be so even in the era of today’s big, super-national, law-giving agencies—such as, for example, the European Union. Often, however, this latter point has been stretched to suggest that, contrary to what the optimists believe, the modern nation state model continues to go strong—and so, the rule of law, with which that model is normally


5. So, then, by stateless democracies I do not here refer to anything like the problems encountered in “stateless societies” as defined by early anthropological investigations of jurisprudence. E.g., Paul Bohannan, The Differing Realms of the Law, 67/6 AM ANTHROPOLOGIST 33, 33–42 (1965).

6. Noticeable is, among others, the research conducted in recent years by Gunther Teubner. See GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Ânne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993).

7. For one suggestive answer to the “why not” question see HARDT & NEGRI, supra note 2.
associated, could not be revoked in doubt. But, surely, neither can be sensibly doubted that the nation states are no longer what they used to be until the end of the Cold War. Nor, on the other hand, can one easily deny how today states seem to be progressively giving-in to certain global and not so accountable organizations or networks of organizations or trends which appear to be rapidly eroding them “from within”—in this respect, the case of Britain being, apparently, exemplary. So, states are loosing grounds and, if relatively stateless democracies (democracies where states constitute just one of the many existing regulatory agencies) may well represent our next best bet, the rule of law may too require some entirely fresh thinking. The interests at stake, of course, are high—as, for example, the recent crisis in Italy over article 18 of the Workers’ Chart (Statuto dei lavoratori), as well as over other just as dubious governmental proposals to reform the judiciary, all too clearly demonstrates. So, while tackling the long-established equation between democracy and the modern nation state, we must today confront the parallel, thorny problem of whether, in the twilight of the modern nation state, there can nevertheless continue to be some sustainable form or degree of democratic legality. This is one of the now increasingly obvious challenges surrounding the matter of human rights, which seem to need states to be fully enforced, but also one of the challenges lying before what has been called the “Seattle movement” or the “movement of all movements”—which purports to oppose war, neo-liberal capitalism and its global strategies. No doubt, though, traditional structures so far supporting and supported by the nation state model do, in this increasingly abstract age, seem to be less and less capable of delivering on their traditional promises. Thus, if national security, for example, has only now revealed the depths of its paradoxes—the increasing difficulties which Western democracies have for some time been experiencing to provide


9. DE MAILLARD, supra note 4.


12. See Gill, supra note 4.

for the old, or the ill, or the migrant are but a few of the more glaring instances of what some may regard as a state of fast-approaching, generalized "stand-still". On the other hand, Jean Baudrillard, for example, reminds us in a recent essay of the "absolutely problematical character" of building and constructing—a warning that could be read as applying to legal constructions too.\textsuperscript{14} In the matter of national security, some rather interesting studies are now being put forward;\textsuperscript{15} but, what about the rule of law?\textsuperscript{16} Can law be thought of in a radically new way? Or should we abandon that very central project of Western democracies altogether?

\section*{III. POETIC COMPARISONS}

"The philosopher of the future is an artist and a physician—in one word, a law-giver."\textsuperscript{17}

\textbf{A. Intimations}

Comparative law, or rather \textit{poetic comparisons} of law's many domains, may well be in a position convenient enough at least to begin to tackle some of the questions raised by many current preoccupations concerning democracy, nation states, and the law in today's highly abstract society. Such larger questions can only be sensibly addressed step by step, rather than at once—but in this paper we can at least begin by asking what poetic comparisons of law might be. That is the principal question we will be addressing in what follows, and the general response to the question is that poetic comparisons of law are a clearing which starts by thinking the question of comparative law—what \textit{is} comparative law?—entirely from scratch. Poetic comparisons, that is, are, in a fundamental sense, \textit{meditating comparisons}.\textsuperscript{18}

However, it should be noted at the outset how poetic comparisons have hardly anything to do with mainstream comparisons—at least in that

\begin{thebibliography}{9}
\bibitem{14} Baudrillard, supra note 2, at 51.
\bibitem{15} See Didier Bigo, To Reassure, and Protect, After September 11, in Perspectives from the Social Sciences (SSRC); Joxe, supra note 4.
\bibitem{16} For a recent survey on some of the consequences of September 11, 2001 on matters of international law, humanitarian and human rights law, and narratives of war, see Law After Ground Zero (John Stawson ed., The GlassHouse Press, The Cavendish Publishing 2002).
\bibitem{17} Gilles Deleuze, Mille Plateaux. Capitalisme et Schizophrénie (Les Editions de Minuit 1980) (translation is the author's).
\bibitem{18} Igor Stramignoni, The King’s One Too Many Eyes: Language, Thought and Comparative Law, UTAH L. REV. (forthcoming 2003).
\end{thebibliography}
they do not focus, like mainstream comparisons generally do, on function, efficiency, or linear-history to find broad, underlying commonalities among the legal rules, institutions or procedures compared. On the other hand, poetic comparisons are no poetry either—for they do think that, in today’s highly abstract society, ordinary language (speech, written word, etc.) can no longer be, as “dissident” comparative lawyers seem by contrast to suggest, the only promising inroad into a meaningful understanding of law’s many domains. Neither mainstream comparative law, nor poetry or


20. In my view, ordinary language cannot tell us the whole story. However, focus on ordinary language can lead to extremely interesting insights—often somewhat more interesting than those that follow to an analysis based on function, efficiency, or linear history. For a sense of what dissident comparative lawyers are up to (and without of course any pretense of completeness), see Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Gunter Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 Harv. Int’l L.J. 411 (1985); Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II), 39 Am. J. Comp. L. 1 (1991); Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law (2nd Installment), 39 Am. J. Comp. L. 343 (1991) [hereinafter Sacco, Legal Formants]; Michael de S.-O.-I’E. Lasser, Judicial (Self-) Portraits: Judicial Discourse in the French Legal System, 104 Yale L.J. 1325 (1995). Also noteworthy are the many diverse articles published by the 1997 Utah Law Review, Symposium: New Approaches to Comparative Law—to
any other form of representational thinking based on ordinary language, poetical comparisons are, in Heidegger’s own terms, “meditating thinking”—not “calculating thinking”.

The distinction between calculating thinking and meditating thinking is a recurrent theme in Heidegger’s existential analytic. For the moment, suffice to say that through “calculating thinking” man always attempts to measure out (rechnen) the circumstances in which he must begin to act. Characteristic (but not exclusive) of scientific thinking, calculating thinking is instrumental thinking—it always counts in advance on the results it hopes to achieve. An estimate as much as an actual measurement, calculating thinking is, so to speak, “restless” thinking—one which is constantly out to calculate the world in some new, more efficient, useful way. If, however, calculating thinking does not meditate the meaning which dominates what there is, “meditating thinking” does. In particular, meditating thinking meditates what, at first, will seem to have hardly any obvious, practical use—it meditates over what, at first, will seem to be of no use if one is to achieve one particular goal or another. For, Heidegger points out, the meaning of things is indeed, strictly speaking, quite useless. Yet, the meaning of things is also what is most necessary—for without meaning even what is useful would be meaningless, and so would no longer be of any use.


thinking—meditating comparisons—not calculating thinking. In particular, they are meditating thinking in that, as we will shortly see, they seek to think what difference the law makes.24

But what difference does the law make? And does the law make any difference? In spite of the appearances, there is no short, self-evident answer to such simple questions—so it may be worth to start by looking more in depth at the difference between calculating and meditating thinking. To do so, let us turn to one of Heidegger's least known contributions to the question of Being—a short exercise entitled The Candlestick (Der Leuchter) and printed for private circulation in 1941—which suggests an unorthodox yet promising point of departure for our inquiry:

Shine-forth Light
Of the Golden Candle,
Blaze
This Darkened Space.

Carry your Light Candlestick
Over Early Sufferings
And Curse
Figures and Monies.

Light and Candlestick
One by the Other...
From There Be Born
A Silent World.25

Some might be tempted to treat The Candlestick as a piece of poetry and, in particular, to see reflected in it the discomfort Heidegger had come to feel in relation to his upbringing as a Roman Catholic, his humble social status and his frequent financial difficulties.26 Rather more interesting however is, in fact, the place of The Candlestick. The piece is included in a collection of similar exercises entitled Intimations (Winke).27 In the Afterword of Intimations, Heidegger explains how (contrary to what one might expect) such exercises should be treated as neither poetic compositions (Dichtungen) nor, on the other hand, some sort of philosophy in verse.28 Instead, they should be considered an instance of poetic thinking—intimations of a thinking which, because it can never be fully expressed by the language which must say it, can and should never

24. See discussion infra Part V.A. See Stramignoni, supra note 18.
28. For a useful, recent discussion on this see FLAVIO CASSINARI, IL PENSIERO POETANTE—LA PRODUZIONE LIRICA HEIDEGGERIANA (1910–1975) (Mimesis 2000).
be taken thus to have been properly exhausted. As such, Heidegger warns, poetic thinking should never be treated as mere calculating thinking. Neither mere poetry nor mere philosophy—poetic thinking is, by contrast, meditating thinking. Neither poetry nor philosophy, poetic thinking is, for Heidegger, up-coming thinking (künftiges Denken)—simply and yet crucially an intimation of the thinking to come.29

B. Thresholds

There are here two main points which Heidegger makes in Intimations and from which we can learn in view of our investigation into poetic comparisons of law’s many domains. The first point is that the relationship between poetic, meditating thinking and (on the other hand) poetry, philosophy, or any other calculating, instrumental thinking, must be fundamentally reinvented—in the original sense of having to be discovered again (inventio). So, then, the relationship between poetic, meditating thinking and Western legal thinking must too be reinvented—for, just like poetry and philosophy, Western legal thinking is calculating, instrumental thinking. The second point is that the relationship between poetic, meditating thinking and what Western metaphysics have traditionally called “Being” must be thought afresh just as well. To be sure, poetic, meditating thinking is the thinking of Being.30 But can we think such relationship afresh—beyond, that is, the smoky screen built, throughout much of the history of Western thinking, by what has developed into merely calculating, instrumental thinking?

Consider again The Candlestick. Light and Candlestick, “one by the other”, are bound in a way which, on first examination, is neither causal nor formal. Yet, there can be hardly any doubt that they are bound all the same. So, there must be some relationship between them—much like the relationship between thinking and Being—and, yet, such relationship must be, again, neither causal nor formal.31 Here, Western philosophical thinking can be of little help—for, again, Western philosophical thinking has long developed into mere calculating thinking. Poetic thinking, by contrast, promises (in the sense purported by Heidegger) to be meditating

29. In the text, the English quotations of Brief über den Humanismus are taken from MARTIN HEIDEGGER, Letter on Humanism, in BASIC WRITINGS 217-65 (David Farrell Krell rev. and exp. ed. 2000).
30. See discussion infra Parts IV.A., V.A.—B.
31. On the relationship between meditating thinking and Being, see discussion infra Part IV.A.
thinking, that is “other-thinking”. Importantly, other-thinking is not only no out-and-out thinking (thinking as thinking is commonly understood to be, thus calculating, instrumental thinking) but also no other-than-thinking. Instead, other-thinking is thinking which is radically other—more precisely, one which is other than the “frantic measuring and calculating” of today’s philosophical (or other) calculating thinking.32

But that is not all. Indeed, not only Heidegger’s poetic thinking is no mere philosophical thinking but there is no mere poetry (no mere representational thinking) either—in so far that poetic, meditating thinking (unlike poetry itself) is in fact image-less (bildlos). The point of poetic thinking, for example, would be neither to construct metaphors nor to lay out descriptions—considering that, in the end, metaphors and descriptions must be representations and, so, thinking which is merely (re)presented in a different way. One may well, of course, encounter suggestive images on the way—one, for example, may well encounter suggestive images in intimations which could be considered “poetic” in the usual sense of that word—but that is not what poetic thinking as meditating thinking is primarily about. The Candlestick, it would seem, is not about a particular, imagined, Heideggerian “silent world” (and, to the extent that it is, it does not greatly matter)—while, at the same time, it does, no doubt, set a world of silence on its way. In that sense, Heidegger’s poetic thinking (whether in intimations or elsewhere) is image-less, for no image or group of images can adequately encompass it. So, it is not, like some would mistakenly have it, image-less in the rather different sense of there not being images in it, which can and must evoke it. Quite the opposite, such thinking is indeed characterized, if at all, by an excess of images rather than a lack thereof.

The point, here, is that seldom are images simple images—instead, normally they are thresholds. And so are words (concepts). It is thus, then, that in Heidegger’s intimations words and images hang at the threshold between calculating thinking and other-thinking (poetic, meditating thinking)—neither here nor there and yet closer to both than, at first, one might realize. So, in The Candlestick, the third stanza—while drawing as it should the “poem” to a close—suddenly starts the first two stanzas as well as the third one on their way. The third stanza, in other words, is, in fact, an opening, a threshold—not a closing. In Deleuzian terms, the third stanza is a threshold in that it marks not so much a limit beyond which one cannot go—as, rather more dramatically, a point of no return.33

33. See Deleuze, supra note 17.
Light and Candlestick
One by the Other . . .
From There Be Born
A Silent World.

Thus, in The Candlestick, the images and words of a "silent world" radiate into the world of silence which has originated it and which it has, recursively, contributed to originate. We must absolutely try to visualize this. Indeed, what is interesting about it (especially for the comparative lawyer) is precisely how there lies the foundational paradox, the illuminating difficulty of language which, through the endless and endlessly creative play of analogies and differences, may well turn out to be, each time, as much calculating, instrumental thinking—as other-thinking.34

IV. THE LANGUAGE OF COMPARISONS

In every point of this city you can, in turn, sleep, make tools, cook, accumulate gold, disrobe, reign, sell, question oracles. The traveler roams all around and has nothing but doubts: he is unable to distinguish the features of the city, the features he keeps distinct in his mind also mingles. He infers this: if existence in all its moments is all of itself, Zoe is the place of indivisible existence. But why, then, does the city exist? What line separates the inside from the outside, the rumble of the wheels from the howls of the wolves?35

A. The Paradox of Language

As an instance of meditating thinking, Heidegger's poetic thinking in The Candlestick exhibits to a considerable extent the foundational paradox of language. Indeed, the paradox of language was precisely what Heidegger must have alluded to when, in a conference held on December 7, 1950 in Bühlerhöle and entitled Language (Die Sprache), he announced how "[l]anguage is language", and how "language speaks".36 At first, those might seem rather odd assertions to make. Yet, they ring true right away. So, what does it mean to say that language is language

36. The conference was repeated on February 14, 1951 in Stuttgart. See HEIDEGGER, Die Sprache (Language), in Unterwegs zur Sprache, in 12 GESAMTAUSGABE, supra note 34, at 229. In the text, the English quotations of Die Sprache are taken from HEIDEGGER, Language, in POETRY, LANGUAGE, THOUGHT, supra note 32, at 189–210.
and that language speaks? Such seemingly confusing propositions must be taken seriously if one is to grasp the potential significance of poetic comparisons of law as a way towards a fresh understanding of the fragile links which bind democracy, the nation state, and law in today's increasingly abstract society. They must be taken seriously if, in other words, one is to grasp which must be today the language of comparisons.

Language, Heidegger explained, is neither mere "expression", nor simply an "activity of man", nor is it only "presentation and representation of the real and the unreal". In short, language is not only out-and-out, calculating thinking (speech, for instance), but also something else—it is also other-thinking. Is it, though, only other-thinking? Not at all. Indeed,

no one would dare to declare incorrect, let alone reject as useless, the identification of language as audible utterance of inner emotions, as human activity, as a representation by image and concept. The view of language thus put forth is correct, for it conforms to what an investigation of linguistic phenomena can make out in them at any time. And all questions associated with the description and explanation of linguistic phenomena also move within the precincts of this correctness.

But if language is both thinking (calculating thinking) and other-thinking, then, we suggest, language is a threshold, at the threshold of both. At the threshold of thinking, language is that which can not (yet) be spoken to the full. It is "up-coming thinking". At the threshold of other-thinking, language is, by contrast, speech "kept safe in what is spoken"—though "often, and too often, we encounter what is spoken only as the residue of a speaking long lost". One, of course, should be weary of treating the threshold of language as a linear, quasi-chronological mark between an inside and an outside or between a prius and a posterius—or, for that matter, one between the included and the excluded. Rather, we would suggest, language is a threshold in the sense that language is "in-between"—at the same time in thinking (in speech, for example) and between thinking and other-thinking (up-coming thinking). In-between thinking and other-thinking, language is language and, at the same time, language speaks. Language, that is, not man.

Furthermore, Heidegger goes on to explain, the threshold of language, the threshold which language is, is a naming and naming is a calling.

38. Language is not, however, other-than-thinking. See discussion infra Part III.B.
41. "Language speaks. This means at the same time and before all else: language speaks. Language? And not man?... Are we, in addition to everything else, also going to deny now that man is the being who speaks? Not at all." Heidegger, Language, supra note 36, at 198. See also Stramignoni, supra note 18.
"The calling here calls into a nearness. But even so the call does not
wrest what it calls away from the remoteness, in which it is kept by the
calling there. The calling calls into itself and therefore always here and
there—here into presence, there into absence."\textsuperscript{42}

Thus naming—the naming of language—is a calling which need not
necessarily be followed by any material motion—while still being an action
of sort, a movement, a gesture. Such calling "calls into itself and therefore
always here and there—here into presence, there into absence". What
did Heidegger mean by that? Which is the place of the calling by
language? "The place of arrival which is also called in the calling is a
presence sheltered in absence."\textsuperscript{43} Hence, again, the paradox of language.
Indeed, the calling of language calls into a presence which can only be
within an absence. Neither present nor absent, what is present can only,
continuously refer back to the absence which, recursively, originates it.
That is why such calling is an invitation—it has nothing to do, we might
add, with traditional instructions, orders or requests (which, sometimes
foolishly, attempt to direct one somewhere and, on the other hand, can
always be defied). Rather, such calling "invites things in, so that they
may bear upon man as things."\textsuperscript{44} Neither instruction, order or request,
such an invitation is, however, still crucial, still original—as, for man,
such things can only be things upon such naming, which is a calling and
an invitation. And it is only thus that things can carry out the world. "In
the naming, the things named are called into their thinging. Thinging,
they unfold world, in which things abide and so are the abiding ones. By
thinging, things carry out world."\textsuperscript{45}

Thus, the multiple paradox of language—language is language and
language speaks, language is both thinking and other-thinking, language is a
calling whereby each presence is "sheltered in absence"—that multiple
paradox turns out to be language's innermost originality. Language, Heidegger
reminds us, is quintessentially original—in the very sense that, each time, it is
both the center (fons et origo) and the threshold of thinking. Language, we
might add, is what Italo Calvino called Zoe—"the place of indivisible
existence."\textsuperscript{46} True horizon of life—language gives life to that horizon. True
horizon of a "silent world"—language gives life to a world of silence.

\textsuperscript{42} See Heidegger, Language, supra note 36, at 199.
\textsuperscript{43} Id. at 199.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 199–200.
\textsuperscript{46} Calvino, supra note 35, at 34.
Poetic comparisons of law’s many domains thus invite us to appreciate that such is the language of law—that such is, indeed, the language of comparisons.

B. Language “Inter Alia”

Neither mainstream comparisons (concerned as they normally are with function, linear-history, or efficiency) nor out-and-out poetry or out-and-out philosophy, poetic comparisons of law are meditating thinking, not calculating thinking. Poetic comparisons, no doubt, compare law’s many domains—law’s people, law’s words, and law’s currency (by law’s “currency” I mean whichever needs the law may from time to time represent)—but, then, the point is: how precisely do they do that? They do that by going back to the meaning of what there is to compare and, from there, to the paradox of language—thus clearing a place in which new concerns may appear and old problems can be reformulated. Poetic comparisons, in short, are a clearing. They are a clearing in that they recognize how language is original and how the originality of language lies in that, counterfactual as that might initially seem to be, language is a center as well as a threshold. In particular, poetic comparisons think, with Heidegger, that language is language, and that language speaks. They think that language is thinking as well as other-thinking. And they think that language is calling. Both a locus and a (non-linear) mark, language is, for poetic comparisons, “in-between”—and so it lies, quite literally, inter alia.

But what does it mean to be lying inter alia? Heidegger does not discuss this in so many words but, we suggest, lying inter alia is a lying which occurs both here and now, as well as elsewhere and else-when. Lying inter alia, that is, is neither a lying which is only a lying—the solitary, oblivious, individual lying of mute matter—nor, on the other hand, lying inter alia is only a lying-together, a symbolic lying designating a unity, or a community, through which this lying only, that is wholly, belongs and without which it cannot properly exist. Lying inter alia is, in fact, none of that. Instead, lying inter alia is both a lying-in and a lying-in-between—or, which is the same, both a now-lying and a then-lying. If that is so, if that is what lying inter alia is about, then language lies inter alia in the precise sense that, each time, language lies both here or there and now or then—as well as lying, at the same time, elsewhere and else-when (inter alia). Importantly, moreover,
language, on lying *inter alia*, lies in-between law too—each time, it lies both *in* law and *in-between* law and other-law (other-thinking), both here and now as well as elsewhere and else-when. Lying *inter alia*, that is, language lies, each time, both at the center and at the threshold of law (as well as elsewhere and else-when).

How so? How does language lie in-between law as well as, generally, *inter alia*? As calculating thinking, language (ordinary language, one might say) lies each time at the center, that is at the origin, of law—that is, language as calculating thinking always *is* law itself (out-and-out law, law as law). As other-thinking, on the other hand, language lies each time at the threshold of law, at the threshold that is with other-law (which, accordingly, is neither out-and-out law nor, simply, other-than-law). Conversely, law as calculating thinking (law as law) lies each time at the center of language—and so, in that respect, law *is* language itself (ordinary language). By contrast, law as other-thinking lies at the threshold of (ordinary) language—a threshold which is both extended and complex, yet away from its center. But if each time language lies both at the center and at the threshold of law—and if each time law lies both at the center and the threshold of language—then, so poetic comparisons suggest, law can never be *just* calculating thinking (it can never be *just* ordinary language). Instead, law must be always, *also*, other-thinking, that is meditating, up-coming thinking. *In-between calculating thinking and other-thinking, law (like language) lies, each time, inter alia*. That is of some importance for poetic comparisons of law’s many domains—for it shows how law *as* law (legal rules, legal procedures, legal concepts etc) *must contain, in itself, the possibility of other-law, of law radically other* (without necessarily being something other-than-law). *In-between law and other-than-law, poetic comparisons suggest, there is always the possibility of other-law, law which is neither out-and-out law, nor something totally other than law. Furthermore, it is precisely because mainstream comparisons tend to ignore that possibility that, when they compare many traditional concepts like, for example, legal causation, adjudication, and legislation, they seem to be hardly capable of saying very much—rather, they sound technical, distant, even indifferent. For example, they take legal rules, institutions, or procedures to “converge” but, on the other hand, seldom they succeed to draw anything or anyone very much closer.*

47. *See generally* Stramignoni, *supra* note 18.
So language lies *inter alia*. And so does law. Poetic, meditating comparisons of law, then, recognize how the multiple paradox of language invites us to think of language as "the house of Being" as well as being the "home" in which "man dwells".\textsuperscript{48} What, we suggest, that really means is that language is the house which language continually, recursively lays-out for man—and man is at home with language. That is why central to the paradox of language (and central, perhaps, to Heidegger's own thinking) is how "Being remains mysterious, the simple nearness of an unobtrusive governance. The nearness occurs essentially as language itself. But language is not mere speech."\textsuperscript{49}

Thus, what Heidegger really appears to think by saying that language is the "house of Being" and that man is at home with language is that, again, language is *inter alia*. That is, language-*is* (language)—but, also, language *is-in-between* (in-between language and other-language, in-between thinking and other-thinking, etc). As such, "[l]anguage . . . is the relation of all relations."\textsuperscript{50} We shall get back to this point throughout the rest of this paper. Meanwhile, one might ask—what, then, is law? The question, of course, is both ancient and daunting but, perhaps, one could begin to approach the question afresh by considering how—both thinking and other-thinking—law (like language) is *inter alia*. What, precisely, does it mean to say that law is *inter alia*? Quite simply, such proposition means that law-*is* (law). But to say that law is *inter alia* also clarifies how, at the same time, law *is-in-between* (in-between law and other-law, in-between thinking and other-thinking, in-between language and other-language). Thus, lying (like language) *inter alia*—law is, in some eminent sense, the house which law continually lays-out for man. And man is at home with law.

C. Pointing

If poetic comparisons of law recognize that law, like language, lies "in-between"—which is the *language* of law, which is the language that poetic comparisons understand to be lying in-between law and other-law? Which is, in short, the language of comparisons? Such question must be asked, if only as a starting point for further thoughts, for what we said before—when, with Heidegger, we said that language is

\textsuperscript{48} Heidegger, Letter on Humanism, in Basic Writings, supra note 29, at 217; Stramignoni, supra note 18.

\textsuperscript{49} Heidegger, Letter on Humanism, in Basic Writings, supra note 29, at 236.

\textsuperscript{50} Heidegger, Das Wesen der Sprache (The Nature of Language), in Unterwegs zur Sprache, in 12 Gesamtausgabe, supra note 34. In the text, the English quotations of Das Wesen der Sprache are taken from Heidegger, On the Way to Language (Peter D. Hertz trans., Harper & Row 1971).
language, language speaks, language is thinking as well as other thinking, and language is calling—all that may have clarified in what way language is in-between but it has not yet told us which language might be the language in question. On the other hand, the language of comparisons which concerns us here is not so much the language (or languages) which poetic comparisons might or might not employ—rather, it is the language of the clearing in which poetic comparisons occur as a clearing. So, which is the language of poetic comparisons?

Before an answer to this question can emerge, let us look at another of Heidegger’s important essays, initially prepared for a series of conferences organized in 1959 by the Bayerische Akademie der Schönen Künste and by the Akademie der Künste in Berlin, and entitled The Way to Language (Der Weg zur Sprache).\textsuperscript{51} In the essay, Heidegger begins with recalling a long-standing tradition moving from Aristotle to the Stoa to Wilhelm von Humboldt all equating language to “speech”—but, then, turning (from the Hellenistic period onwards) away from sign understood as a showing towards sign understood as a designating. Yet, Heidegger adds, that is somewhat unsatisfactory for it does hide from sight what language actually is, “it does not show the way in which language essentially unfolds as language . . . the way it remains gathered in what it grants itself on its own as language.”\textsuperscript{52} Instead, what is needed is “to bring language as language to language”—that is, to get “closer to what is peculiar to language.”\textsuperscript{53} But how to do so—how can we bring language as language to language? No doubt, a starting point is to realize how “speech belongs to the speakers, but not as cause to effect. Rather, in speech the speakers have their presencing. Where to? Presencing to the wherewithal of their speech, to that by which they linger, that which in any given situation already matters to them.”\textsuperscript{54}

In other words, the relationship between the speakers and their speech cannot be understood as a mere causal relationship. It cannot, in particular, be properly designated by the sequence thought–sound–voice. That long-standing Western tradition would be indeed misleading. On the other hand, while in language a number of elements and relations are

\textsuperscript{51} HEIDEGGER, Der Weg zur Sprache (The Way to Language), in \textit{Unterwegs zur Sprache}, in 12 Gesamtausgabe, supra note 34. In the text, the English quotations of Der Weg zur Sprache are taken from HEIDEGGER, \textit{The Way to Language}, in Basic Writings, supra note 29, at 393–426.

\textsuperscript{52} HEIDEGGER, \textit{The Way to Language}, in Basic Writings, supra note 29, at 405.

\textsuperscript{53} \textit{Id.} at 406.

\textsuperscript{54} \textit{Id.}
clearly in question, so far Western thinking has been content, each time, merely to enumerate such elements and relationships. Yet, "counting is a recounting. It previews the unifying power in cohesion, but cannot yet bring it to the fore." Thus, the unifying unity of language has hitherto remained nameless. Not even "language" would do—for what, each time, is done under such rubric is merely to name such unity, each time, in one or another respect. That is, what is done is, each time, to name "language" only in this or that other mode of language.

So, Heidegger calls such so far name-less unity of language "rift-design" (Der Aufriss). The rift-design, he explains, is "the drawing of the essence of language, the well-joined structure of a showing in which what is addressed enjoins the speakers and their speech, enjoins the spoken and its unspoken." Revolving as they do around such name-less unity, speech and what is spoken remain, however, insufficiently thought of. No doubt, of course, "speech" and "what is spoken" designate what comes forward whenever something is said—but, Heidegger warns, saying is something other than speaking and, so, one must ask what, in fact, is that which we call saying.

Saying is, for Heidegger, a showing, a letting something appear, a letting it be seen and heard—and to speak is a saying something to one another. So, then,

what pervades the rift-design in the essence of language is a richly configured saying, from various provenances. With a view to the concatenations of saying, we shall call the essence of language as a whole the saying [die Sage]. Even so, we have to admit that the unifying element in these concatenations is not yet in sight . . . What unfolds essentially in language is saying as pointing. Its showing does not culminate in a system of signs. Rather, all signs arise from a showing in whose realm and for whose purposes they can be signs.

Thus, neither mere saying nor mere speech, language is the saying—more precisely, saying as pointing. Neither merely human nor, of course, inhuman or supernatural, such pointing is, as a self-showing (an appearing), characteristic "of every manner and degree of thing present"—while, as human-showing, it is, each time, still preceded "by a thing's letting itself be shown." That is why the sequence thought-

55. Id. at 407.
56. Id. at 408.
57. So, too, "[t]he unspoken is not merely what is deprived of sound; rather, it is unsaid, what is not yet shown, what has not yet appeared on the scene. Whatever has to remain unspoken will be held in reserve in the unsaid." Id. at 409.
58. Id. at 409–10 (emphasis is Heidegger's).
59. "Speech is, of course, the creation of sounds. It can also be taken as an activity of human beings. Both are correct representations of language as speech." Id. at 408.
sound-voice on which Western thought has so far articulated its concept of speech should be carefully reconsidered. Speech, Heidegger goes on to suggest, is indeed all that—but it is also, at the same time, a hearing.

Speech, taken on its own, is hearing. It is listening to the language we speak. Hence speaking is not simultaneously a hearing, but is such in advance... We not only speak language, we speak from out of it. We are capable of doing so only because in each case we have already listened to language. What do we hear there? We hear language speaking.61

Thus, language is the saying (Die Sage), the saying is a pointing ("language speaks by saying; that is, by showing"), and speech is a hearing (or, a hearing in advance)—in the precise sense that upon hearing "we find ourselves caught up in a hearing that lets itself be told, a hearing that embraces all apprehending and representing."62 That is, we would add, how poetic comparisons of law, which are a clearing, think of language. They think of language not the way language is commonly thought of by calculating thinking.63 Instead, they think of language as a pointing—while, on the other hand, thinking of speech (the old sequence thought-sound-voice) as a hearing. If law must be thought afresh, and if poetic comparisons of law are to help in such an enterprise, then language, so poetic comparisons suggest, might need to be thought again—the language of comparisons. The language of comparisons—the language of the clearing in which comparisons occur as a clearing—would thus be not, or not merely, ordinary language.64 Instead, there is language inter alia—that is, both a pointing and a hearing. Both a pointing and a hearing, the language of comparisons is, thus, both thinking and other-thinking, both law and other-law.65

61. Id. at 411 (emphasis is Heidegger's).
62. Id. See also HEIDEGGER, ÜBERLIEFERTE SPRACHE, supra note 21.
63. There are many suggestive works on language understood in a broader sense than simply as ordinary language—e.g., J. M. Lotman & B. Uspenskij, MIF—IMJA—KUL'TURA, in TRUDY PO ZANKOVYM SISTEMAM 282–303 (Tartu, 1973); MICHEL FOUCAULT, SURVEILLER ET PUNIR, NAISSANCE DE LA PRISON (Gallimard 1975); PETER GOODRICH, LANGUAGES OF LAW—FROM LOGICS OF MEMORY TO NOMADIC MASKS (1990); GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., Giulio Einaudi ed., 1995); CARLO GINZBURG, WOODEN EYES: NINE REFLECTIONS ON DISTANCE (Martin Ryle & Kate Soper trans., 2001) (1998).
64. But see Geoffrey Samuel, Comparative Law and Jurisprudence, 47 INTL & COMP. L.Q. 817 (1998).
65. We may now leave The Way to Language. Heidegger, however, goes on to discuss the difficult matters of owning (Eignen), the appropriating (Ereignen), and propriation (Ereignis)—the analysis of which can be, for present purposes, safely postponed.
V. Meditating Comparisons

This thing that is called difference, we encounter it everywhere and always in the matter of thinking . . . Our thinking is free either to pass over the difference without a thought or to think of it specifically as such. But this freedom does not apply in every case.\footnote{66}

A. Thinkers and Poets, and the Comparatist Poet

In an increasingly abstract age such as the one which we are experiencing today, comparative lawyers must engage in poetic, meditating comparisons. Learning from Heidegger, what is here meant by that is that comparative lawyers must think again the fundamental concepts of comparative law so as to clear the way from a thinking which is merely a calculating thinking. Such clearing-meditating is not so much a re-thinking—literally, a re-presentation, yet another presentation of what there already is. Instead, such clearing-meditating is also, and more originally, a meditating thinking—an absolute thinking, a thinking freed as much as possible from the fetters of calculating thinking (absolutum) while, at the same time, being as it must in relation to it. Legal comparisons must be meditating comparisons—in the specific sense that they must meditate afresh what they have long become accustomed to compare and so now tend to take for granted. In particular, legal comparisons as meditating comparisons must ask (or must ask again) what is comparative law.\footnote{67} That, we suggest, is the urgent question of comparative law—the question which comparative law must confront if it is sensibly to address the serious issues which today concern Western democracies and the rule of law.

So, legal comparisons can no longer content themselves to be traditional comparisons, that is calculating comparisons. Instead, they must be meditating comparisons. But, then, what is it, precisely, that legal comparisons must meditate? Surely, legal comparisons must meditate the meaning of what, at first, may seem to be the simplest aspects of comparisons. So, to begin with, the question of comparative law, the question which comparative law must address if it is to tackle satisfactorily the new challenges set by today’s more abstract world, requires us to ask, first of all, which is the language laying at the heart of comparative law. Which, one must ask, is the language to which comparative law must urgently pay attention?

In the preceding pages we have offered some preliminary indications as to which might be one possible result of the inquiry concerning language. Such indications are far from being complete and much more

\footnote{66. \textsc{Martin Heidegger}, \textit{Identity and Difference} 63 (Jean Stambaugh trans., Harper Torchbooks 2002).}

\footnote{67. On the need to ask such question see Stramignoni, \textit{supra} note 18.}
would need to be said. Furthermore, many other similar inquiries should be made as well. In each case, each resulting prospect would go some way towards a fuller reconsideration of the more fundamental question investigating what a radically different comparative law might look like. But before getting any closer to the question of comparative law, let us briefly turn one last time to language. For at the threshold of language, neither within nor without language (as language is, as we have seen, *inter alia*) there are *thinkers* and *poets*, and their meditating thinking. Just as, for Heidegger, meditating thinking is neither mere philosophy nor mere poetry nor any other form of useful if somewhat crude calculating thinking—so, too, Heidegger’s thinkers and poets are neither orthodox philosophers nor orthodox poets. Instead, they are “those who think and those who create with words.” To think with words and to create with words is, in both cases, meditating thinking. That is why Heidegger’s thinkers and poets are “guardians of language”—the guardians of the house of Being in which man dwells. As guardians of language, Heidegger’s thinkers and poets are neither the high priests of language, nor its oracles or prophets. Instead, they are just that—those who guard language. Indeed, and more simply, “[t]heir guardianship accomplishes the manifestation of Being insofar as they bring the manifestation of language and maintain it in language through their speech.”

Heidegger’s thinkers and poets are guardians of language—and so, we suggest, are comparatist poets. It is precisely thus that comparatist poets understand in what way language can be law as well as language and, similarly, how law can be language as well as law. But, if law and language might well be found to rest on one another’s gaze, then comparatist poets must, each time, guard the law at the same time as they guard language. And, similarly, they must guard language at the same time as they guard the law.

So, then, comparatist poets are guardians of law as well as guardians of language. By no means, of course, comparatist poets are the *sole* guardians of law. Nor, we have seen, are comparatist poets anything like law’s high priests, oracles or prophets. Instead, we suggested, comparatist poets are there, at the threshold of law, simply to guard the law. They guard the law for they are thinkers and poets. And their guardianship too, like that of Heidegger’s thinkers and poets,

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68. HEIDEGGER, Letter on Humanism, in BASIC WRITINGS, supra note 29.
69. Id.
accomplishes the manifestation of Being insofar as they seek to bring the manifestation of law (that is, of language) and maintain it in law (that is, in language) through their speech.

At the threshold of law, as well as of language, neither within nor without the law, neither "imprisoned" by language (as some would have it) nor wholly free from it, comparatist poets are there to guard the law (or, for that matter, to guard language). But what precisely does it mean to say that comparatist poets guard the law? The English verb guard derives from the noun ward (Old English weard, corresponding to Middle Low German warde, Old High German warta) in the sense of "watch" (normal development of West Germanic wardō, formed on ward-, extension of war- "be on guard", "watch"). In its most original sense, then, guarding something or somebody is not so much a protecting, a fending off—as is, first of all, a watching, a watching with care. But what does it mean to be "watching with care"? To be watching with care is to be looking at something or somebody thoroughly, comprehensively, to be looking at that something or somebody in their own terms. To be watching with care is, in particular, to be aware (the now obsolete English form for such a term being, precisely, ware). To be aware of what? To be aware of a belonging together. More specifically, to guard is, first of all, to be deeply aware of a presence, to be vigilant in that presence—and, certainly, that is what comparatist poets must be there to do. In law's presence, in the presence—each time—one or another of law's many domains, comparatist poets are deeply aware of that presence, and they remain vigilant in that presence. Yet, importantly, to guard is not only thus to be aware of a presence, and to remain vigilant in that presence—in what is, in fact, the presence of a presence. Instead, to guard is also, and at the same time, to be aware of an absence and, so, to remain vigilant in that absence—that is, in the presence of that absence. Such is, indeed, the sense in which guarding is, as earlier suggested, a looking at something or somebody thoroughly, comprehensively, in their own terms—in their own radical belonging together. Such comprehensive gaze must no doubt embrace those and that in whose presence the comparatist poet may from time to time happen to be. But also, and somewhat more crucially, that gaze must be able to

70. That earlier meaning sometimes survives even in today’s English—take, for example, ware (“articles of merchandise or manufacture,” in compound nouns such as “hardware”) which derives from the Germanic warō (in all probability, “object of care”).
71. Here, we cannot expand on this. For Heidegger, however—and in the case of man—such would be the belonging together of man and Being. See HEIDEGGER, IDENTITY AND DIFFERENCE, supra note 66.
72. Guarding, in that sense, would be an entering into the “event of appropriation”. HEIDEGGER, supra note 66, at 36.
reach whoever and whatever else is, in fact, absent—while, at the same time, being present as an absence. Or, which is the same, each time comparatist poets are present, they must be co-present together with a present presence—but also, and at the same time, with a present absence. And it is by the co-presence of each present presence and present absence that both presence and absence are kept together while, on the other hand, not being held together. Now, much more, of course, would need to be said—but, for the time being, suffice simply to add how what that means is that, on the one hand, comparatist poets, being guardians of law, are always co-present together with law in one or another of law’s many domains. On the other hand, that also means that, in each case, comparatist poets are co-present together with that which, though being apparent only as an absence, speaks of them as well as of law’s words, law’s people, law’s currencies, etc.—as a presence. And that which, in each case, speaks as a presence of comparatist poets as well as of law’s words, law’s people, law’s currencies, etc.—is, of course, language. For language speaks—not man.

So, comparatist poets, as guardians of law, are, in each case, co-present with law as well as with language—and not, as some would have it, with law in spite of language or, else, with language in spite of law. Comparatist poets, then, are comparatist poets in so far as they are aware of, and remain vigilant in, such manifold co-presence. And such co-presence, of course, is possible for comparatist poets, like all of Heidegger’s thinkers and poets, are guardians of language. As we have seen, language is language, and language speaks. As language is language, and language speaks; and, as comparatist poets are guardians of language (as well as of law), comparatist poets are closer than most to that which, in each case, is spoken by it.

B. Meditating Difference

But how, precisely, can that be? In what way are comparatist poets, in each case, closer than most to that which is spoken by language? A first inroad into such question is to realize that language is language, language speaks, and comparatist poets are guardians of language. But some further thinking will make apparent how, in each case, comparatist poets are closer than most to that which is spoken by language for, unlike others, comparatist poets are distant—forever distant—from that
which is dearest to most. That is, they are distant from home.\textsuperscript{73} Forever distant from home, by no means do comparatist poets keep themselves, or anyone else, or anything else, at a distance—as if, despite such distance, some closeness were still possible yet somewhat mysteriously (if harshly) denied. To the contrary, the point is that, forever distant from home, comparatist poets poetically dwell in the distance.\textsuperscript{74} And it is by poetically dwelling in the distance, and only by poetically dwelling in the distance, that comparatist poets can tell what difference the law makes—and so they can say it. That is, in turn, quite important—for that is indeed where the originality of poetic comparisons, as well as the responsibility of the comparatist poet, may be taken to lie. The originality of poetic comparisons is thus to be found not so much in what might or might not make poetic comparisons distinctive—as, rather more fundamentally, in whatever there may or may not be to them which would be productive, that is, original. In particular, the originality of poetic comparisons must lie in what difference the law makes which comparatist poets can tell and then say—and, similarly, it is precisely in the saying of what they can tell that their responsibility, too, must be found to rest. So, then, what difference does the law make? The answer to this question cannot be sought once and for all—for there can be no single answer that could be evoked which would genuinely respond, that is, correspond, to the rich variety of law’s many domains (law’s people, law’s words, and law’s currencies). Yet, it is an important question to ask, and it is indeed by poetically dwelling in the distance—and only by poetically dwelling in that distance—that, in each case, comparatist poets can properly think the experience of difference.\textsuperscript{75}

Thus, in summary, poetic comparisons of law are original precisely in that comparatist poets can tell, in each case, what difference the law makes—a difference which, then, they are going to say. Comparatist poets can tell what difference the law makes for—forever distant from home—comparatist poets poetically dwell in the distance and so can properly think the experience of difference. If that is the case, we can now make one further step towards a fuller (albeit still incomplete) answer to the question of comparative law—the question which asks: what is comparative law?\textsuperscript{76} So far, we have been able to see how, if comparative lawyers are genuinely to contribute to the current, crucial

\textsuperscript{73} See Stramignoni, supra note 18.

\textsuperscript{74} On the concept of dwelling poetically, see Heidegger, supra note 32, at 213–29.

\textsuperscript{75} See Stramignoni, supra note 18.

\textsuperscript{76} For Heidegger, questions such as “what is comparative law?” require a stepping backwards (rather than forwards) as the manner of moving forward, see Martin Heidegger, Das Wesen der Sprache, in Unterwegs zur Sprache, in 12 Gesamtausgabe, supra note 34.
debates on the future of Western democracies and the rule of law, they may have seriously to engage in poetic, meditating comparisons. Comparative lawyers, that is (or at least some of them), may have to become comparatist poets. Poetic, meditating comparisons, we have also seen, are a clearing—but what, in particular, might that clearing succeed to clear? A first central answer is that such a clearing may clear the way for a rather more radical meaning of language than that which is often held—a more radical meaning of language than language understood as, simply, ordinary language. Instead, on the alternative meaning proposed here, language no doubt belongs to women and men but—somewhat more fundamentally—women and men belong to language.77

Yet a further way in which poetic, meditating comparisons would occur as a clearing would be whenever we began to realize how poetic, meditating comparisons would meditate difference. Meditating difference, that is, would be another interesting way by which we could draw closer to a freshly thought-of answer to the question of comparative law—an answer to the question: what is comparative law?

In comparative law like elsewhere, meditating difference is, of course, neither easy nor obvious a task. By contrast, it is a task fraught with political, economic, social, and religious implications. So, for example, H. E. Yntema (in 1942) understandably associated difference with nationalism when praising comparative law for helping to realize the goal of the international unification of law, as well as foster the principle of solidarity.78 More recently another commentator notes how “[d]ifferences between legal systems have been regarded, at least from the time of Cicero, as evils or inconveniences to overcome. A Babel of laws seems divisive, confusing, and obstructive, and every age has its advocates for a unified law—a common law of mankind.”79 So, no doubt the modern association of comparative law with often prevailing universalistic projects must have worked as a powerful deterrent against meditating difference—so long as the general belief, largely induced by the horrors of WWII, was that “there is... no true science of law unless it is universal in scope and spirit. Comparative law is... one element in this new

77. Stramignoni, supra note 18.
universalism so important today. Yet, the very real imperviousness of meditating difference as difference must also be a reason why comparative law studies generally ignore or play-down difference—or why, when they do engage with it, they often fail to note how events such as WWII, the fall of the Berlin wall and September 11, 2001, now require us to think of difference in some entirely fresh manner.

So, then, mainstream comparative lawyers do of course take difference as the starting point of their legal comparisons (whether they understand difference to be functional, efficiency-related or linear-historical, is here unimportant). However—as the interest of mainstream comparative lawyers lies rather solidly in the uncovering of what structural similarities they believe functional, efficiency-related, or linear-historical differences to reveal—mainstream comparative lawyers end-up giving difference relatively little attention. So, for example, Konrad Zweigert and Hein Kötz tell us, somewhat unhelpfully, how “different legal systems” answer certain questions “quite differently.” More interestingly, Saul Levmore sets out to explain uniformity and variety in law by resorting to the basic tenets of behavioralism—but, so long as what he really hopes to demonstrate is uniformity and not variety, he then makes very little effort to take the latter seriously. Similarly, John Henry Merryman is clear about the key-role that difference ought to hold in comparative law research—when, for instance, one considers the debate on the supposed convergence of the various legal families of the world. Indeed, Merryman openly admits how the convergence debate can in fact “mislead by diverting attention from the forces of divergence”—yet, what exactly might he understand by those particular expressions evoking difference—remains unclear.

80. DAVID & BRIERLEY, supra note 19, at 16.
81. Thus, for example, little is said on difference, see ZWEIGERT & KÖTZ, supra note 19; DAVID & BRIERLEY, supra note 19; Helmut Coing, European Common Law: Historical Foundations, in NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE (Mauro Cappelletti ed., European University Institute 1978); Ugo Mattei, Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems, 45 AM. J. COMP. L. 5, (1997).
82. ZWEIGERT & KÖTZ, supra note 19, at 39.
84. To the question: Are legal systems, and in particular, the Civil Law and the Common Law, converging, the answer must be yes. But they are also diverging; both processes are going on at the same time. If such thing can be imagined, and if it would be workable, the product of the present tendency might ultimately be one universal, but highly pluralistic, legal system. Merryman, supra note 79, at 373.
85. Id. at 375. And, he adds, “[t]he movement is toward internal diversity and complexity, and the fact that it is going on more or less simultaneously in Western nations demonstrates that in some important ways these legal systems are diverging.” Id.
If difference is little more than a working assumption for mainstream comparative lawyers—something to get away from—some of the most inquisitive writers do, by contrast, recognize the very real impact of difference in comparisons—which, unlike the others, they firmly place at the core of their analysis. While that approach is to be preferred if one is eventually to engage in poetic comparisons, what exactly do such “dissidents” comparative lawyers mean by difference is often left for the reader to work-out. So, for example, while Rodolfo Sacco recognizes how “[l]aws and languages are dominated by difference,” and how “all that is real is dominated by diversity,” quite what might he take difference or diversity to mean is not said. Similarly, Pierre Legrand is keen to stress how “the common law mentalité is not only different, but is actually irreducibly different, from the civil law mentalité as found in Continental Europe”—so much so that “[i]t is between these legal traditions that ‘the primordial cleavage—the summa differentia—lies.” Legrand argues that such summa differentia appears in the different nature of legal reasoning, the significance of systematization, the character of rules, the roles of facts, the meaning of rights and the presence of the past—but, again, what the nature might be of such summa differentia, of such “irreducible differences”, Legrand does not say. Even Günter Frankenberg—for whom “re-imagining comparative legal studies” requires the abandonment of all forms of “legocentrism” and its “normative imagery” in favor of a “rigorous experience of distance and difference”—leaves the reader to work-out for themselves what, in the


87. Sacco, supra note 86, at 172.
88. Legrand, supra note 8, at 63.
89. Id. at 64–74.
91. “By legocentrism I mean that law is treated as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony.” Frankenberg, supra note 20, at 445.
92. Id. at 447.
93. Id. at 453.
context of the critical approach advocated by that author, “difference” might actually be.

Unlike mainstream comparative lawyers (who simply ignore difference by either discounting or demonizing it), dissident comparative lawyers know exactly what they mean when they bring difference back to the center stage of comparative analysis. However, theirs is often a notion which we can broadly but aptly characterize as “neo-Hegelian”. The considerable range of neo-Hegelian conceptions of difference which seem to underlie much dissident comparative law is, perhaps, a testimony of the richness and suggestiveness of that scholarship. Furthermore, such neo-Hegelian conceptions of difference refreshingly lead dissident comparative lawyers to give maximum attention to ordinary language. Now, that is all very well and good—but how are neo-Hegelian conceptions of difference to deal with world events like the fall of the Berlin wall and, now, September 11, 2001? The disintegration of the Eastern block and the consequential, radical reconfiguration of the “West”—which many feel the attack on the Twin Towers has shockingly come to symbolize—seem to warn us that the “other” no longer exists. Indeed, what might be left of the meaning today so far conveyed by ordinary language—by the like of “rights”, “security”, “terror”, “private law”, “public law”, “legal family”, “history”, “function”, “efficiency” or “convergence” (to mention, of course, but a few)? What, in short, might be the meaning of ordinary language, when ordinary language is no longer capable of relating to the other—for no longer is the other out-there to be said?

C. Difference as Difference

Poetic comparisons of law’s many domains are meditating comparisons. Meditating comparisons start from the question of comparative law—they start by asking what the heartland of comparative law might be. However, hardly any meaningful answer to such a question can possibly come very much into sight if one contents oneself to stop at functions, efficiency, and linear-history, or, for that matter, at ordinary language. Surely, functions, efficiency, linear-history, and ordinary language can be looked at fruitfully—provided, of course, that the comparatist poet has an interest in them. Poetic comparisons indeed encourage one to look at functions, efficiency, linear-history, and (better still) at ordinary language, if one is interested in them. Yet, the point is that poetic comparisons encourage us to do so in order to step back from them and look at function, efficiency, linear-history, and language entirely afresh.

94. Not, at least, the “other” with which the West had been, until now, familiar.
Would such stepping back not be a distancing?\textsuperscript{95} No.\textsuperscript{96} Quite the opposite, such stepping back would be a getting closer and closer to those and other fundamental aspects of comparative law which happen to interest the comparatist poet. Yet, such a nearness would be required in order to think function, efficiency, linear-history, ordinary language, etc., entirely afresh. For “if man is to find his way once again into the nearness of Being he must first learn to exist in the nameless.”\textsuperscript{97} But how might that nearness be achieved? By getting straight back to language as well as to difference. By language, poetic comparisons understand both a pointing and a hearing—not simply ordinary language. What, then, do they mean by difference?

Once again, valuable insights can be derived from Heidegger’s own thinking. In a lecture given at Todtnaumberg in 1957, and entitled (quite forbiddingly) \textit{The Onto-theo-logical Constitution of Metaphysics}, Heidegger sets out to discuss the nature of Western metaphysics which, he notes, firmly root the difference between Being and (human) beings on Being itself. Whether by Being Heidegger means a god, nature, reason, man, or society—is here beside the point. The point by contrast is that, Heidegger notes, at the origins of each new phase of Western thinking there is this simple act of differentiation between Being and (human) beings—through which Western thinking will each time be able to resort to Being in order to explain the “essence” of (human) beings.\textsuperscript{98} But have Western metaphysics, and so Western thinking, given enough thought to difference? Metaphysics, Heidegger explains, have been, since the Greeks, both ontology and theology. As ontology, metaphysics think Being as the \textit{first} and most \textit{universal} ground of all beings. As theology, metaphysics think Being as the \textit{highest} ground above all beings. That is what Heidegger calls the onto-theo-logical nature of Western metaphysics and, indeed, of Western thinking. And that is how Western metaphysics have been able thus to ground the difference between Being and (human) beings on Being itself. What, however, the onto-theo-logical nature of Western metaphysics has at the same time been able also to conceal is, precisely, the nature of the

\begin{footnotes}
95. Such is the sense advocated by some dissident comparative lawyers. \textit{See} Frankenberg, supra note 20.
96. On such “step back” \textit{see} HEIDEGGER, supra note 66, at 49.
97. HEIDEGGER, \textit{Letter on Humanism, in Basic Writings}, supra note 29.
98. On the metaphysical character of Western thinking \textit{see id}.
\end{footnotes}
fundamental difference metaphysics claim to posit—that between Being and (human) beings. "The oblivion here to be thought is the veiling of the difference as such, thought in terms of ἀθανάτιον (concealment); this veiling has in turn withdrawn itself from the beginning."  

Not only the nature of such difference has gone systematically unnoticed—but it is on the basis of that very act of oblivion that "metaphysics, Western thinking in its entire nature, can be what it is."  

That is, the thinking of Being as the ground of the difference between Being and beings. For it is only on the basis of the oblivion of that difference as difference that all metaphysics can turn out to be "at the bottom, and from the ground up, what grounds, what gives account of the ground, what is called to account by the ground, and finally what calls the ground to account."  

Thus we think of Being rigorously only when we think of it in its difference with beings, and of beings in their difference with Being. The difference thus comes specifically into view. If we try to form a representational idea of it, we will at once be misled into conceiving of difference as a relation which our representing has added to Being and to beings. Thus the difference is reduced to a distinction, something made up by our understanding (Verstand).  

Now, while "this thing that is called difference, we encounter it everywhere and always in the matter of thinking"—we are normally free to ignore it. But we cannot always ignore it. And when, instead of ignoring it, we try to think it in a more rigorous way, we soon find out how the Being of beings means Being which is beings. The "is" here speaks transitively, in transition. Being here becomes present in the manner of a transition to beings . . . Being shows itself as the unconcealing overwhelming. Beings as such appear in the manner of the arrival that keeps itself concealed in unconcealedness.  

In the characterization proposed by Heidegger, difference as difference, difference as such, is thus one between overwhelming and arrival—whereby, we finally discover,

[i]the difference of Being and beings, as the differentiation of overwhelming and arrival, is the perdurance (Austrag) of the two in unconcealing keeping in concealment.  

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99. HEIDEGGER, supra note 66, at 50. "The oblivion belongs to the difference because the difference belongs to the oblivion. The oblivion does not happen to the difference only afterward, in consequence of the forgetfulness of human thinking." Id. at 50-51.
100. Id. at 51.
102. HEIDEGGER, supra note 66, at 62.
103. Id. at 63.
104. Id. at 64-65.
105. Id. at 65.
The difference which Western thinking has long let fall in oblivion—the difference as such between Being and beings—is therefore the *perdurance* of overwhelming and arrival. “Within this perdurance there prevails a clearing of what veils and closes itself off—and this its prevalence bestows the being apart, and the being toward each other, of overwhelming and arrival.”106 It is that difference—difference as such—that, Heidegger suggests, should be the matter of thinking, the thinking of Being. For while that difference is nowhere to be seen—it is indeed that difference and nothing else that “begins the history of metaphysics, governs all of its epochs, and yet remains everywhere concealed as perdurance, and thus forgotten in an oblivion which even escapes itself.”107 That difference, poetic comparisons of law suggest, is the matter of legal thinking too—if legal thinking and, in particular, comparative legal thinking are to make a meaningful contribution to some of today’s most urgent debates.

Indeed, poetic comparisons suggest, Western legal thinking, Western concepts of law, represent no exception within the metaphysical tradition of Western thinking. Law’s many domains are, they too, traditionally characterized by endless “differences”—which, born out of a relentless if almost obsessive need to measure-up “(human) beings” against a “Being” of sort, the law continually, even frantically is compelled to make: nature and legal culture, global and local, legal theory and legal practice, adjudication and legislation, form and substance, substance and procedure, subject and object, individual and society, man and woman, native and immigrant, minor and adult, able and disabled, heterosexual and homosexual, and generally human and non-human (to mention, of course, but a few). Epistemologically, those are indeed critical differences—productive differences no less than (and often more than) they are descriptive. Their role in legal thinking is generally recognized—and refinements regularly proposed. Yet, such differences are seldom if ever seriously considered by comparative lawyers. And when they are seriously considered,109 the nature of that difference remains normally un-thought.
That is why poetic comparisons of law invite us to think, or to think again, what difference the law makes—when law makes such differences. Clearly, the difference that each time the law makes lies, poetic comparisons suggest, in the multiple distinctions which, in each case, with feverish determination continually separate and continually regroup Being and (human) beings. But the original difference—the difference as difference which, in each case, lies at the origins of law’s frantic distinctions—that difference has long been forgotten, and needs to be thought again. With Heidegger, poetic comparisons encourage us to step back and think that difference as perdurance—and that, of course, applies especially to comparative law. For what, for example, is function, linear-history, efficiency or, indeed, ordinary language if not, in each case, the infinite perdurance of the Being-functionally-equivalent, the Being-historical, the Being-efficient, or the Being-logos of what, in each case, is dutifully and infinitely Being-compared?

VI. CONCLUSIONS

"Let us … in the days ahead remain as wanderers on the way into the neighborhood of Being."  

A. The “How” of Comparative Law

After the fall of the Berlin wall and, now, September 11, 2001, many feel that the nature and relationship of nation states and democracy might be set to change—when it has not already changed. If that is the case, then surely such changes must be addressed—and with them must be addressed those changes that primarily affect the law. Indeed, law’s many domains might have to be thought entirely afresh. That is of course quite a project—yet, it is an urgent project to think about, one that can no longer be sensibly postponed. Whether, in particular, by law one refers to legal rules, legal institutions, legal procedures,
legal concepts, or, indeed, legal conceptions\textsuperscript{112}—one can no longer be concerned, simply, with law as it was.

Unlike what is sometimes suggested by certain writers, legal comparatists might well be in a rather eminent position to contribute to that particular project—which concerns political theory, law, and everyday life alike. But, first, comparatists must think the question of comparative law entirely afresh. What, then, is comparative law? Rather than stopping at function, efficiency, history, or even ordinary language, legal comparatists might wish to begin by thinking afresh the \textit{is} of that question. That is, they might begin by turning to poetic, meditating comparisons.

A radical answer to the question of comparative law shows how poetic comparisons of law, as meditating comparisons, require us to bring \textit{language} and \textit{difference} back at the center stage of comparative analysis. By language and difference poetic comparisons mean neither ordinary language nor difference in the sense normally employed by most comparative law studies. Instead, by language poetic comparisons mean both a pointing and a hearing, and by difference what they mean is difference as such. Yet, it is precisely by putting language as a pointing and as a hearing, and difference as such, back at the center of legal analysis that, poetic comparisons suggest, meaningful comparisons can still be sensibly pursued in today's changing, increasingly abstract society. In fact, that is indeed what was earlier meant by saying that the originality of poetic comparisons lies in that they set out to think \textit{what difference the law makes}.

One concluding remark. The question of comparative law invites of itself to meditate comparisons. Meditating comparisons, however, is less a \textit{what} than a \textit{how}—how can comparative law be thought afresh? It might well be that it is only the perdurance of the question that, each time, allows the question to be asked and the answer to be answered. If that is the case, then meditating comparisons—to meditate comparisons—is meditating thinking in the most original sense of that expression.

\textsuperscript{112} Hilary Putnam, Reason, Truth and History (1981).